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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2 -----x
UNITED STATES OF AMERICA,

New York, N.Y.

3
4 v.

18 Cr. 30 (PAC)

5 PAUL VAN MANEN and KENNETH
CHARLTON,

6 Defendants.

7 -----x

Trial

8 May 16, 2019
9:00 a.m.

9 Before:

10 HON. PAUL A. CROTTY,

11 District Judge
- and a Jury-

12 APPEARANCES

13 GEOFFREY S. BERMAN

United States Attorney for the
Southern District of New York

14 BY: JESSICA K. FENDER

RYAN B. FINKEL

15 CATHERINE E. GHOSH

Assistant United States Attorneys

16 QUIJANO & ENNIS, P.C.

Attorney for Defendant Van Manen

17 BY: PETER E. QUIJANO

18 ANNA N. SIDERIS

19 O'NEILL & HASSEN

Attorney for Defendant Charlton

20 BY: GRAINNE E. O'NEILL

21 THE LAW OFFICE OF CARLOS M. SANTIAGO

Attorney for Defendant Charlton

22 BY: CARLOS M. SANTIAGO, JR.

23 ALSO PRESENT:

24 MADISON DUNBAR, Paralegal, U.S. Attorney's Office

25 WILLIAM COLEMAN, Paralegal, U.S. Attorney's Office

LILY LAU, Paralegal, Quijano & Ennis

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1 (Trial resumed; jury not present)

2 THE COURT: Good morning. Please be seated. Good
3 morning, all.

4 MR. FINKEL: Good morning.

5 MS. O'NEILL: Good morning.

6 THE COURT: Do you want to get started? The jury is
7 here.

8 MR. QUIJANO: One thing, your Honor.

9 Your Honor, I believe I left my exhibits on the table.
10 I don't see them. I don't think I took them home. I believe
11 most of them can be recreated. They were government exhibits.
12 I just discovered this.

13 THE COURT: Okay. Anybody know anything about it?

14 MR. FINKEL: We don't have them.

15 MR. QUIJANO: No, I know that.

16 THE COURT: I don't think that was the question.

17 MR. QUIJANO: I was not suggesting that.

18 MR. FINKEL: Beyond that, the government has nothing
19 to offer.

20 MS. O'NEILL: We will check in our papers.

21 MR. QUIJANO: Meanwhile, maybe, could I ask you
22 possibly, most of them were government exhibits. Do you think
23 you --

24 MR. FINKEL: We can talk about that. The parties will
25 work together to try to resolve that problem.

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1 But while we are putting things on the record, your
2 honor, just two things to note from the government's
3 perspective:

4 One, Exhibit 301X, was not on the disk and therefore
5 has not actually been offered in evidence but is on the record
6 as being offered in evidence. We noticed this as we were going
7 through the exhibits last night. We ask the court to remove
8 that 301X from evidence.

9 THE COURT: Move it into evidence?

10 MR. FINKEL: Take it out of being in evidence. It
11 doesn't actually exist, but it is on the court transcript as
12 being in evidence.

13 THE COURT: Okay. It is out of evidence.

14 MR. FINKEL: And, second, 507 and 511 are stipulations
15 that the parties had entered into. The government has not
16 offered in all of the pieces of that stipulation. There are a
17 couple of paragraphs that pertain to certain drug seizures
18 which the government did not offer. Therefore, we prepared
19 redacted versions of those stipulations to be sent back to the
20 jury after the charge.

21 THE COURT: Okay.

22 MR. QUIJANO: Your Honor --

23 THE COURT: Have the defendants seen those redacted
24 charges?

25 MR. FINKEL: We will certainly provide them.

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1 MR. QUIJANO: Ms. Sideris had an unexpected family
2 issue. We can certainly start without her. She should be here
3 in ten minutes.

4 THE COURT: If you don't mind, I would like to get
5 started.

6 MR. QUIJANO: No, no, that's perfectly fine, of
7 course.

8 MR. FINKEL: Finally, your Honor, the government
9 prepared a trial indictment and shared it with defense counsel,
10 and that will be ready for the jury as well.

11 THE COURT: Okay. Fine. Thank you.

12 MR. FINKEL: Thank you.

13 THE COURT: Is Ms. Ghosh going to join us?

14 MS. FENDER: She is working on finalizing the exhibits
15 to go back to the jury. We don't need to wait.

16 THE COURT: Okay.

17 (Continued on next page)

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(Jury present)

THE COURT: Good morning. Please be seated.

I am now going to read to you the instructions on the law. You are going to be familiar with some of these terms because they were mentioned at the *voir dire* and the preliminary instructions, and yesterday, in closing arguments of the parties, there were references to the instructions that I was going to give. You should know that all of the parties have seen advance copies of these instructions.

So I always start by saying how important your service is to our country and our system of justice. You, the jury, have been most conscientious in your attendance, your punctuality, and the complete attention that you have given during the trial.

As I say, I am going to read these instructions to you now, but I wanted you to know that I am going to send the instructions into your room, so you do not have to take notes as you listen. As a matter of fact, I prefer it if you didn't take notes because you will have the actual instructions with you in the jury room.

Do not single out any particular instruction as alone stating the law; you should consider, instead, my instructions as a whole.

You are about to start your deliberations now. You have heard all of the evidence, as well as the final, or

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1 closing, arguments of the lawyers for the parties. Now it is
2 my duty to instruct you as to the law that will govern your
3 deliberations. As I told you at the start of the case, and as
4 you agreed, it is your duty to accept my instructions of the
5 law and to apply them to the facts as you determine them.

6 Regardless of any opinion that you may have as to what
7 the law may be or ought to be, it is your sworn duty to follow
8 the law as I give it to you. Also, if any other attorney or
9 other person has stated a legal principle different from any
10 that I state to you in my instructions, it is my instructions
11 that you must follow. You will begin your deliberations after
12 these instructions.

13 Your duty is to decide the factual issues in this case
14 and arrive at a verdict. The jury is the sole and exclusive
15 judges of the facts. You decide the weight of the evidence,
16 the credibility of the witnesses. You resolve such conflicts
17 as there may be in the testimony, and you draw whatever
18 reasonable inferences you decide to draw from the facts as you
19 determine them.

20 In determining the facts, you must rely upon your own
21 recollection of the evidence. None of what the lawyers have
22 said in their opening statements, their closing arguments,
23 their questions, or objections is evidence. The lawyers are
24 not sworn as witnesses. They do not testify. They make
25 arguments about what conclusions you should draw from the

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1 evidence or lack of evidence. But as I said, that is
2 argumentation, not evidence. And the same applies to me.
3 Anything that I may have said is not evidence. I have allowed
4 you to take notes but, as I said earlier, when I did that, your
5 notes are not evidence either.

6 The evidence before you consists of just two things:
7 the testimony given by the witnesses that was received in
8 evidence and the exhibits that were received in evidence.

9 Testimony consists of the answers that were given by
10 the witnesses to the questions that were allowed. The
11 questions themselves are not evidence. It is the answers to
12 the questions that count. Also, as I instructed you at the
13 beginning of this case, and I am sure you complied with my
14 instruction, anything you may have seen or heard about this
15 case outside the courtroom is not evidence and must be entirely
16 disregarded.

17 It is the duty of the attorney for each party to
18 object when the other party offers testimony or other evidence
19 that the attorney believes is not properly admissible. Counsel
20 also have the right and duty to ask the court to make rulings
21 of law and to request conferences out of the hearing of the
22 jury. All such questions of law must be decided by me. You
23 should not show any prejudice against any party or attorney
24 because the attorney objected to the admissibility of evidence,
25 or asked for a conference out of your hearing, or asked me for

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1 a ruling on the law.

2 The testimony and documents that have been admitted
3 into evidence are appropriate for your consideration. You may
4 consider all the evidence that has been admitted.

5 I ask you to draw no inference from my rulings or from
6 the fact that, upon occasion, I asked questions of certain
7 witnesses. My rulings were not more than applications of the
8 law and my questions were only intended for clarification or to
9 expedite matters. You are expressly to understand that I have
10 no opinion as to the verdict you should render in this case.

11 You are to perform your duty of finding the facts
12 without bias or prejudice as to any party. You are to perform
13 your duty with an attitude of complete fairness and
14 impartiality. This case is important to both parties.
15 Mr. Van Manen and Mr. Charlton are charged with a serious
16 crime. They have pleaded not guilty. It is important to the
17 government, too. Enforcement of criminal laws is a prime
18 concern of the government.

19 The fact that the prosecution is brought in the name
20 of the United States of America entitles the government to no
21 greater consideration than that accorded to any other party.
22 By the same token, it is entitled to no less consideration.
23 All parties, whether the government or individual, stand as
24 equals before the court.

25 It would be improper for you to consider, in reaching

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1 your decision as to whether the government has sustained its
2 burden of proof, any personal feelings you may have about
3 Mr. Van Manen's and Mr. Charlton's race, religion, national
4 origin, gender, sexual orientation, or age. Similarly, it
5 would be improper for you to consider any personnel feelings
6 you may have about the race, religion, national origin, gender,
7 sexual orientation, or age of any witness or anyone else
8 involved in this case. Each defendant is entitled to the
9 presumption of innocence, and the government has the burden of
10 proof, as I will discuss in more detail in a moment. It would
11 be equally improper for you to allow any feelings you might
12 have about the nature of the crime charged to interfere with
13 your decision-making process.

14 Do not be swayed by sympathy. Rather, the crucial
15 question that you must ask yourselves as you review the
16 evidence is: Has the government proved the guilt of each of
17 Mr. Van Manen and Mr. Charlton beyond a reasonable doubt?

18 You cannot let bias, prejudice, fear, disgust,
19 sympathy, or any other irrelevant considerations interfere with
20 your thinking. That might interfere with your obligation to
21 arrive at a true and just verdict, so do not be guided by
22 anything except clear thinking and calm analysis of the
23 evidence. Sympathy or feeling sorry should play no role in
24 your deliberations.

25 You should also not consider any personal feelings you

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1 may have about the attorneys who represented the parties in
2 this matter. As I indicated at the beginning of this trial,
3 the lawyers and other participants at the counsel table have
4 been instructed not to have any communication with you as
5 jurors. If, due to the congestion in the courthouse, you ran
6 into counsel and they ignored you, they did so because they
7 were supposed to ignore you. That's the rule. This should not
8 influence your decision regarding Mr. Van Manen's or
9 Mr. Charlton's innocence or guilt in any way.

10 Now a word about punishment. The potential punishment
11 of the two defendants is not a jury concern and should not, in
12 any sense, enter into or influence your deliberations. The
13 duty of imposing a sentence rests exclusively with the court.
14 Your function is to weigh the evidence, or lack of evidence, in
15 the case and to determine whether or not the government has
16 proved that Mr. Van Manen, Mr. Charlton, or both, are guilty
17 beyond a reasonable doubt.

18 I told you before -- and I'm going to tell you
19 again -- Mr. Van Manen and Mr. Charlton are presumed innocent
20 until proven guilty beyond a reasonable doubt. Mr. Van Manen
21 and Mr. Charlton have pleaded not guilty to the charges alleged
22 in the indictment. As a result, the government has the burden
23 to prove each defendant's guilt beyond a reasonable doubt.
24 This burden never shifts from the government to Mr. Van Manen
25 and Mr. Charlton for the simple reason that the law presumes

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1 each defendant innocent and never imposes upon any defendant in
2 a criminal case the burden or duty of calling any witness or
3 producing any evidence.

4 In other words, Mr. Van Manen and Mr. Charlton start
5 with a clean slate. They are presumed innocent until such time
6 that you, the jury, are unanimously satisfied that the
7 government has proved Mr. Van Manen, Mr. Charlton, or both,
8 guilty beyond a reasonable doubt. If the government fails to
9 sustain this burden with respect to either Mr. Van Manen and
10 Mr. Charlton or both, you must find either of them, or both of
11 them, not guilty.

12 The government must prove each defendant guilty beyond
13 a reasonable doubt. The question then is: What is a
14 reasonable doubt? The words almost define themselves. It is a
15 doubt based upon reason. It is a doubt that a reasonable
16 person has after carefully weighing all of the evidence. Proof
17 beyond a reasonable doubt must, therefore, be proof of such a
18 convincing character that a reasonable person would not
19 hesitate to rely and act upon it in the most important of his
20 or her own affairs.

21 A reasonable doubt is not a guess or a whim, it is not
22 speculation or suspicion, it is not an excuse to avoid the
23 performance of an unpleasant duty, and it is not sympathy. The
24 law does not require that the government prove guilt beyond all
25 possible doubt. Proof beyond a reasonable doubt is sufficient

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1 to convict.

2 If, after a fair and impartial consideration of all of
3 the evidence, you have a reasonable doubt as to the guilt of
4 Mr. Van Manen, Mr. Charlton, or both, it is your duty to find
5 the defendant you are considering not guilty. On the other
6 hand, if after a fair and impartial consideration of all of the
7 evidence, you are satisfied that the government has met its
8 burden of proving Mr. Van Manen, Mr. Charlton, or both
9 defendants' guilt beyond a reasonable doubt, it is your duty to
10 find that defendant, or both defendants, guilty.

11 That concludes my instructions on general principles
12 that you have to follow.

13 I turn now to instructions on evidence. Let me remind
14 you again that Mr. Van Manen and Mr. Charlton were formally
15 charged in an indictment. They are entitled to know the
16 charges against them. But as I instructed you when the trial
17 began, the indictment is not evidence. It merely describes the
18 charges against Mr. Van Manen and Mr. Charlton and may not be
19 considered by you as any evidence of guilt. You are to give no
20 weight to the fact that a grand jury properly returned an
21 indictment against Mr. Van Manen and Mr. Charlton. I am not
22 going to read the indictment to you because I'm going to send
23 the indictment in to the jury room and you can look at it
24 yourself.

25 Now, a word or two about direct and circumstantial

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1 evidence. In deciding whether Mr. Van Manen, Mr. Charlton, or
2 both, are guilty or not guilty, you may consider both direct
3 evidence and circumstantial evidence.

4 Direct evidence is evidence that proves a disputed
5 fact directly. For example, when a witness testifies to what
6 he or she saw, heard, or observed, that is called direct
7 evidence.

8 Circumstantial evidence is evidence that tends to
9 prove a disputed fact by proof of other facts. To give you a
10 simple example, suppose that when you came into the courtroom
11 today, this is a true example, the sun was shining and it was a
12 nice day. But now the courtroom blinds are drawn and you
13 cannot look outside. As you are sitting here, someone walks in
14 with a dripping wet umbrella and, soon after, someone walks in
15 with a dripping wet raincoat. Now, on our assumed facts, you
16 cannot look outside of the courtroom and see whether it is
17 raining, so you have no direct evidence of that fact. But, on
18 the combination of the facts about the umbrella and the
19 raincoat, it would be reasonable for you to conclude that it
20 had started to rain. That is all there is to circumstantial
21 evidence. Using your reason and experience, you infer from
22 established facts the existence or nonexistence of some other
23 facts.

24 An inference is the deduction or conclusion that
25 reason and common sense prompt a reasonable mind to draw from

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1 the facts that have been proven by the evidence. Not all
2 logically possible conclusions are legitimate or fair
3 inferences. Only those inferences to which the mind is
4 reasonably led or directed are fair inferences from direct or
5 circumstantial evidence in this case. Whether or not to draw a
6 particular inference is, of course, a matter expressly for you
7 to decide, as are all determinations of fact.

8 Many material facts, such as state of mind, are rarely
9 susceptible of proof by direct evidence. There is no way for
10 us to look into people's minds, so those facts are established
11 by circumstantial evidence and the inferences the jury draws
12 from them. The law makes no distinction between direct and
13 circumstantial evidence. Circumstantial evidence is of no less
14 value than direct evidence and you can consider either or both,
15 and give them such weight as you conclude is warranted.

16 A word or two about witness credibility. It must be
17 clear to you by now that counsel for the parties are asking you
18 to draw very different conclusions about the significant
19 factual issues in this case. An important part of your
20 decision will involved making judgments about the testimony of
21 the witnesses you have listened to and observed. In making
22 these judgments, you should carefully scrutinize all of the
23 testimony of each witness, the circumstances under which each
24 witness testified, and any other matter in evidence that may
25 help you decide the truth and the importance of each witness's

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1 testimony. For example, was the testimony of a witness
2 corroborated by the testimony of another witness or another
3 exhibit or a recording which was received in evidence?

4 Your decision whether or not to believe a witness may
5 depend on how that witness impressed you. Was the witness
6 candid, frank, and forthright or did the witness seem to be
7 evasive or suspect in some way? How did the witness testifying
8 on direct examination compare with how the witness testified on
9 cross-examination? Was the witness consistent or
10 contradictory? Did the witness appear to know what he or she
11 was talking about? Did the witness strike you as someone who
12 was trying to report his knowledge or her knowledge accurately?
13 What was the witness's demeanor like? These are the examples
14 of the kind of common sense questions you should ask yourself
15 in deciding whether a witness or is not truthful.

16 In addition, you may consider whether a witness has
17 any possible bias or relationship with a party, or any possible
18 interest in the outcome of the case. Such a bias,
19 relationship, or interest does not necessarily make the witness
20 unworthy of belief. They are simply factors that you should
21 consider.

22 In making a determination of witness credibility, you
23 may consider whether the witness purposefully made a false
24 statement or whether it was an innocent mistake. You may also
25 consider whether an inconsistency concerns an important fact or

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1 merely a small detail, as well as whether the witness had an
2 explanation for the inconsistency and, if so, whether that
3 explanation appealed to your common sense. If you find that a
4 witness has testified falsely as to any material fact, you may
5 reject that witness's testimony in its entirety, or you may
6 accept those parts that you believe to be truthful or that are
7 corroborated by other independent evidence in the case.
8 Further, you may consider whether a witness has been previously
9 untruthful, including lying under oath in another proceeding in
10 determining how much of his or her testimony, if any, you wish
11 to believe.

12 You should also consider whether the witness had an
13 opportunity to observe the facts the witness testified about,
14 whether the witness was under the influence of any substances
15 when the event occurred, and what impact that might have on the
16 witness's recollection or perception of the events, and whether
17 the witness's recollection of the facts stands up in light of
18 the other evidence in this case.

19 In other words, what you must try to do in deciding
20 credibility is to size up a person just as you would in any
21 important matter where you are trying to decide if a person is
22 truthful, straightforward, and accurate in his or her
23 recollection.

24 Now a word about preparation of witnesses. You have
25 heard testimony during the trial that witnesses have discussed

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1 the facts of the case and their testimony with lawyers before
2 the witnesses appeared in court. You may consider that fact
3 when you are evaluating a witness's credibility, but there is
4 nothing either unusual or improper about a witness meeting with
5 lawyers before testifying so that the witness can be aware of
6 all of the subjects that will be covered, focus on those
7 subjects, and have the opportunity to review the relevant
8 exhibits and documents before being questioned about them.
9 Such consultations help conserve your time and the court's
10 time. The weight you give to the fact or the nature of the
11 witness's preparation for his or her testimony and what
12 inferences you draw from such preparation are matters
13 completely within your discretion.

14 It is for you, the jury, and for you alone, not the
15 lawyers or the witnesses or me, as the judge, to decide the
16 credibility of witnesses who appeared here and the weight their
17 testimony deserves. After making your own judgment or
18 assessment concerning the credibility of a witness, you can
19 then attach such importance or weight to his or her testimony,
20 if any, that you feel it deserves. You will then be in a
21 position to decide whether the government has proved the
22 charges beyond a reasonable doubt.

23 With respect to law enforcement officials, you have
24 heard testimony from a number of law enforcement officials.
25 The government's law enforcement witnesses do not deserve any

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1 more or less consideration, or greater or lesser weight, than
2 of any other witness. In this context, it is appropriate for
3 defense counsel to try to attack the credibility of such a
4 witness on the ground that his or her testimony may be colored
5 by a personal or professional interest in the outcome of the
6 case. It is up to you to accept or reject the testimony of
7 each law enforcement witness and to give such testimony the
8 weight, if any, it deserves.

9 With regard to the expert witnesses, you have heard
10 testimony from three expert witnesses -- Dr. Terra Cederroth,
11 from the Office of the Chief Medical Examiner; and Brittany
12 Christie and Dimitri DeVito from the New York City Police
13 Department labs. An expert is someone who, by education or
14 experience, has acquired learning or experience in a science or
15 a specialized area of knowledge. These witnesses were
16 permitted to give their opinions as to relevant matters about
17 which they have special knowledge, skill, experience, and
18 training. This testimony was presented to you on the theory
19 that someone who is experienced in this field can assist you in
20 understanding the evidence or in reaching an independent
21 decision on the facts.

22 Your role in judging credibility applies to experts as
23 well as to the other witnesses. You should consider the expert
24 opinions that were received in evidence in this case and give
25 them as much or as little weight as you may think they deserve.

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1 If you should decide that the opinion of an expert was not
2 based on sufficient education or experience or on sufficient
3 data, or if you should conclude that the trustworthiness or the
4 credibility of the expert is questionable for any reason, or if
5 the opinion of the expert was outweighed in your judgment by
6 other evidence in the case, you might disregard the opinion of
7 the expert entirely or in part.

8 If, however, you find that the opinion of an expert is
9 based on sufficient data, education, and experience, and the
10 other evidence does not give you reason to doubt the expert's
11 conclusion, you would be justified in relying on that expert's
12 testimony.

13 Now, with regard to cooperating witnesses, let me say
14 a few things you may want to consider during your deliberation
15 on the subject of what we have been calling cooperating
16 witnesses. You have heard testimony from three individuals --
17 Shaun Sullivan, Jasmin Cejovic, and Anthony Francese -- who are
18 considered cooperating or accomplice witnesses. There has been
19 a great deal said about these so-called accomplice witnesses in
20 the summations of counsel and whether or not you should or
21 should not believe them.

22 The government argues, as it is permitted to do, that
23 it must take the witnesses as it finds them. It argues that
24 only people who themselves take part in criminal activity have
25 the knowledge required to show criminal behavior by others.

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1 For those very reasons, the law allows the use of accomplice
2 testimony. Indeed, it is the law in federal courts that the
3 testimony of accomplices may be enough in itself for
4 conviction, if the jury finds that the testimony establishes
5 guilt beyond a reasonable doubt.

6 However, it is also the case that accomplice testimony
7 is of such nature that it must be scrutinized with great care
8 and viewed with particular caution when you decide how much of
9 that testimony to believe. The cooperating witnesses are
10 facing fairly long maximum sentences, and mandatory minimums,
11 and are hoping for a reduced sentence. For those witnesses,
12 the government decides whether to file a motion for a reduced
13 sentence, and the sentencing court, according to its own
14 determination, decides what sentence to ultimately impose. I
15 must caution you that it is no concern of yours why the
16 government made agreements with these witnesses. Your sole
17 concern is to decide whether the witnesses have given truthful
18 testimony in this case before you.

19 I have given you some general considerations on
20 credibility, and I will not repeat them here, nor will I repeat
21 all of the arguments made on both sides. However, let me say a
22 few things that you may want to consider during your
23 deliberations on the subject of accomplices.

24 You should ask yourself whether these so-called
25 accomplices would benefit more by lying or by telling the

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1 truth. Was their testimony made up in any way because they
2 believed or hoped that they would somehow receive favorable
3 treatment by testifying falsely? Or did they believe that
4 their interests would be best served by testifying truthfully?
5 If you believe that the witness was motivated by hopes of
6 personal gain, was the motivation one that would cause him to
7 lie or was it one that would cause him to tell the truth? Did
8 this motivation color his testimony?

9 In sum, you should look at all of the evidence in
10 deciding what credence and what weight, if any, you will want
11 to give to the testimony of the accomplice witnesses.

12 In the same vein, you have heard testimony from
13 government witnesses who have pleaded guilty to charges arising
14 out of some of the same facts that are at issue in this case.
15 I instruct you that you are to draw no conclusions or
16 inferences of any kind about the guilt of the defendants on
17 trial from the fact that certain prosecution witnesses pled
18 guilty to charges relating to or similar to the crimes charged
19 in this case. Those witnesses' decisions to plead guilty were
20 personal decisions that they made about their own guilt. They
21 may not be used by you in any way as evidence against or
22 unfavorable to the defendants on trial here.

23 You have also heard the testimony from a government
24 witness, Derek Yung, who testified pursuant to an agreement
25 with the government that, in exchange for truthful testimony,

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1 the government agreed not to prosecute that witness for certain
2 specified crimes that he may have committed.

3 The government is permitted to enter into these types
4 of understandings and is entitled to call as witnesses people
5 with whom such an agreement is entered. The fact that the
6 government has agreed not to prosecute this witness does not
7 disqualify him from testifying and does not preclude you from
8 accepting that testimony as true.

9 However, the testimony of a witness who has been
10 promised that he will not be prosecuted should be examined by
11 you with greater care than the testimony of an ordinary
12 witness. You should scrutinize it closely to determine whether
13 or not it is colored in such a way as to place guilt upon
14 Mr. Van Manen and/or Mr. Charlton in order to further the
15 witness's own interests; for, such a witness, confronted with
16 the realization that he can win his own freedom by helping to
17 convict another, has a motive to falsify his testimony. Such
18 testimony should be received by you with suspicion and you may
19 give it such weight, if any, as you believe it deserves.

20 One final note in this regard. It is of no concern to
21 you why the government has entered into such an agreement with
22 a witness. Your sole concern is to decide whether Mr. Yung was
23 giving truthful testimony in this case before you. In sum, you
24 should look to all of the evidence in deciding what credence
25 and what weight, if any, you will give to a witness's

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1 testimony.

2 Now, some of the people who may have been involved in
3 the events leading to this trial are not on trial. This does
4 not matter. You may not draw any inferences, favorable or
5 unfavorable, towards the government or the defendants from the
6 fact that certain people, other than the defendants, are not on
7 trial here. Those matters are wholly outside your concern and
8 have no bearing on your function as jurors.

9 With respect to uncalled witnesses who are equally
10 available to both sides, there are people whose names you have
11 heard during the course of the trial but who do not appear here
12 to testify. I instruct you that each party has an equal
13 opportunity or lack of opportunity to call any of these
14 witnesses. Therefore, you should not draw any inferences or
15 reach any conclusions as to what they would have testified to
16 had they been called. Their absence should not affect your
17 judgment in any way.

18 You should, however, remember my instruction that the
19 law does not impose on a defendant in a criminal case the
20 burden or duty of calling any witnesses or producing any
21 evidence. The burden remains with the government to prove the
22 guilt of a defendant beyond a reasonable doubt.

23 You may have heard references to the fact that certain
24 investigative techniques were used and that others were not
25 used by the government. You may consider these facts in

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1 deciding whether the government has met its burden of proof
2 because, as I told you, you should look to all of the evidence
3 or the lack of evidence in deciding whether the defendants are
4 guilty. However, there is no legal requirement that the
5 government prove its case by any particular means and you are
6 not to speculate as to why the government used the techniques
7 they did or why they did not use other techniques. The
8 government is not on trial here. The law enforcement
9 techniques are not your concern.

10 Your concern is to determine whether or not, based on
11 the evidence or lack of evidence here in this case, the guilt
12 of Mr. Van Manen, Mr. Charlton, or both, has been proven beyond
13 a reasonable doubt.

14 With regard to the evidence obtained from searches,
15 you heard testimony in this case about evidence seized in
16 connection with searches conducted by law enforcement officers.
17 Evidence obtained from these searches was properly admitted in
18 this case and may be properly considered by you. Whether you
19 approve or disapprove of how the evidence was obtained should
20 not enter into your deliberations, because I instruct you that
21 the government's use of this evidence is entirely lawful.

22 You must, therefore, give this evidence full
23 consideration along with all the other evidence in this case in
24 determining whether the government has proved the guilt of
25 Mr. Van Manen, Mr. Charlton, or both, beyond a reasonable

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1 doubt.

2 Now a word about audio and video recordings and
3 transcripts. Recordings of various conversations have been
4 admitted into evidence. Whether you approve or disapprove of
5 the recording or interception of those conversations may not
6 enter your deliberation. I instruct you that these recordings
7 were made in a lawful manner, that no one's rights were
8 violated, that the government's use of the evidence is entirely
9 lawful, and that it was properly admitted into evidence at
10 trial. You must, therefore, regardless of any personal
11 opinions, give this evidence full consideration along with all
12 of the other evidence in this case in determining whether the
13 government has proved beyond a reasonable doubt the guilt of
14 either Mr. Van Manen, Mr. Charlton, or both.

15 In connection with the recordings that you have heard,
16 you were provided with transcripts of the conversations to
17 assist you while listening to the recordings. I instruct you
18 that, with the exception of transcripts labeled GX 306ET and GX
19 306FT, all of the other transcripts are not evidence. The
20 transcripts were provided only as an aid to you in listening to
21 the recording. It is for you to decide whether the transcripts
22 correctly present the conversations recorded on the recordings
23 that you heard. If you think you heard something differently
24 than appeared on the transcript, then what you heard is
25 controlling. If you wish to hear any of the recordings again

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1 or see any of the transcripts, they will be made available to
2 you during deliberations.

3 We have, among other exhibits received in evidence,
4 some documents that are redacted. "Redacted" means that part
5 of the document was taken out. You are to concern yourself
6 only with that part of the item that has been admitted into
7 evidence. You should not consider any possible reason why the
8 other part of it has been deleted.

9 During the trial, there were charts and summaries
10 shown to you. These charts and summaries were shown to you in
11 order to make the other evidence more meaningful and to aid you
12 in considering the evidence. They are no better than the
13 testimony or the documents upon which they are based and are
14 not themselves independent evidence. Therefore, you are to
15 give no greater weight or greater consideration to these
16 schedules or summaries than you would give to the evidence upon
17 which they are based.

18 It is for you to decide whether the charts, schedules,
19 or summaries correctly present the information contained in the
20 testimony and in the exhibits on which they were based. You
21 are entitled to consider the charts, schedules, and summaries
22 if you find that any of them are of assistance to you in
23 analyzing and understanding the evidence.

24 You have heard evidence in the form of stipulations of
25 testimony, read to you from government exhibits numbered in the

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1 500 series. A stipulation of testimony is an agreement among
2 the parties that, if called as a witness, the party would have
3 given certain testimony. You must accept as true the fact that
4 the witness would have given that testimony. But it is for
5 you, however, to determine the effect to be given that
6 testimony.

7 You have also heard evidence in the form of
8 stipulations of fact. A stipulation of fact is an agreement
9 among the parties that a certain fact is true. You should
10 regard such agreed facts as true. It is for you, however, to
11 determine the effect to be given to any stipulated fact.

12 The law does not require any party to call as a
13 witness all persons who may have been present at any time or
14 place involved in this case or who may appear to have some
15 knowledge of the matter in issue at trial. Nor does the law
16 require any party to produce as exhibits all relevant papers
17 and things available to either party during the course of the
18 trial.

19 The government has offered evidence tending to show
20 that on a different occasion Mr. Charlton engaged in conduct
21 similar to the charge in the indictment.

22 In that connection, let me remind you that
23 Mr. Charlton is not on trial for committing this act not
24 alleged in the indictment. Accordingly, you may not consider
25 this evidence of the similar act as a substitute for proof that

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1 Mr. Charlton committed the crime charged. Nor may you consider
2 this evidence as proof that Mr. Charlton has a criminal
3 personality or bad character. The evidence of the other
4 similar act was admitted to demonstrate Mr. Charlton's
5 identity, intent, and knowledge, to establish the opportunity
6 or the absence of mistake or accident with regard to the
7 offense charged in Count One, and to demonstrate the background
8 of the conspiracy charged here. You may consider it only for
9 that limited purpose.

10 If you determine that Mr. Charlton committed the act
11 charged in the indictment and the similar act as well, then you
12 may, but you need not draw an inference that, in doing the acts
13 charged in the indictment, Mr. Charlton acted knowingly and
14 intentionally and not because of some mistake, accident, or
15 other innocent reasons.

16 Evidence of similar acts may not be considered by you
17 for any other purpose. Specifically, you may not use this
18 evidence to conclude that because Mr. Charlton committed the
19 other act, he must have committed the act charged in the
20 indictment.

21 The defendant in a criminal case never has any duty to
22 testify or come forward with any evidence. That is because, as
23 I told you, the burden of proof beyond a reasonable doubt
24 remains on the government at all times, and the defendant is
25 presumed innocent. In this case, Mr. Van Manen and

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1 Mr. Charlton did testify and were subjected to
2 cross-examination just like any other witness. You should
3 examine and evaluate the testimony just as you would the
4 testimony of any witness with an interest in the outcome of the
5 case.

6 That concludes my instructions on evidentiary matters.

7 I turn now to the substantive law.

8 The defendants, Paul Van Manen and Kenneth Charlton
9 have been formally charged in an indictment containing one
10 count, or charge. The indictment in this case is not evidence.
11 Let me remind you of that again. It merely describes the
12 charges made against the defendants. It is a set of
13 accusations. It may not be considered by you as evidence of
14 the guilt of the defendants. Only the evidence or lack of
15 evidence decides that issue.

16 Count One charges that, from at least in or about 2013
17 through in or about January 2018, Mr. Van Manen and
18 Mr. Charlton agreed with each other or others to violate the
19 narcotics laws of the United States. In summary, Count One
20 charges that each defendant and others conspired to violate the
21 federal criminal laws prohibiting the distribution of and
22 possession with intent to distribute a controlled substance,
23 namely, heroin and fentanyl.

24 Count One also charges against Mr. Van Manen only that
25 the use of the controlled substances distributed by members of

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1 the conspiracy resulted in (1) the serious bodily injury of
2 Shaun Sullivan on or about October 5, 2017, and (2) the death
3 of Michael Ogno on or about December 1, 2017. We'll discuss
4 this portion of Count One separately in a few minutes.

5 Before I explain the crime of conspiracy in more
6 detail, I want to say something about the dates described in
7 the indictment. The indictment charges the conspiracy in Count
8 One existed from in or about 2013 through in or about January
9 2018. It is not essential that the government prove the
10 conspiracy started and ended on those specific dates. Indeed,
11 it is sufficient if you find that, in fact, the conspiracy was
12 formed and that it existed for some period of time within the
13 period set forth in the indictment, that is, from 2013 to
14 January of 2018.

15 Now let me say a word about the crime of conspiracy.
16 A conspiracy is kind of a criminal partnership -- a combination
17 or agreement of two or more persons to join together to
18 accomplish some unlawful purpose. The crime of conspiracy to
19 violate a federal law is an independent offense. It is
20 separate and distinct from the actual violation of any specific
21 federal law, which the law refers to as "substantive crimes."
22 Accordingly, you may find a defendant guilty of the crime of
23 conspiracy to violate the narcotics laws of the United States,
24 even though the actual crime was not committed. Congress has
25 deemed it appropriate to make conspiracy, standing alone, a

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1 separate crime, even if the conspiracy is not successful. This
2 is because collective criminal activity poses a greater threat
3 to the public's safety and welfare than individual conduct and
4 increases the likelihood of success of a particular criminal
5 venture.

6 To sustain its burden of proof with respect to the
7 crime of conspiracy, the government must separately prove
8 beyond a reasonable doubt the following two elements as to this
9 conspiracy count:

10 First, the existence of the conspiracy charged -- that
11 is, with respect to Count One of the indictment, the existence
12 of an agreement or understanding to violate the laws of the
13 United States that make it a crime to distribute and possess
14 with intent to distribute a controlled substance, that's the
15 first requirement;

16 Second, that either Mr. Van Manen, Mr. Charlton, or
17 both, knowingly became members of the conspiracy charged, that
18 is, that either of them knowingly associated themselves with
19 the conspiracy and participated in the conspiracy to distribute
20 or possess with intent to distribute narcotics.

21 Now let us separately consider these two elements.

22 The first element, as I said, is the existence of the
23 conspiracy. The first element that the government must prove
24 beyond a reasonable doubt is that the conspiracy charged in the
25 indictment existed. In this instance, the unlawful purpose

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1 alleged to have been the object of the conspiracy charged in
2 the indictment is either the distribution of a controlled
3 substance or the possession of the controlled substance with an
4 intent to distribute it.

5 As I explained a moment ago, the essence of the crime
6 of conspiracy is the unlawful agreement to violate the law.
7 The gist, or the essence, of the crime of conspiracy is the
8 agreement or understanding between two or more people to
9 accomplish some unlawful purpose. This unlawful agreement or
10 understanding must be between two or more individuals not
11 operating under the direction of the government at the time of
12 the agreement. The ultimate success of the conspiracy, or the
13 actual commission of the crime that is the object of the
14 conspiracy, is not required.

15 The conspiracy alleged here, therefore, is the
16 agreement to commit the crime. That is an entirely separate
17 and distinct offense from the underlying offense, which the law
18 calls a "substantive crime." The crime of conspiracy is
19 complete once the unlawful agreement is made and the defendant
20 enters into it. Accordingly, you may find a defendant guilty
21 of the crime of conspiracy to distribute a controlled substance
22 or conspiracy to possess a controlled substance with the intent
23 to distribute, even though the actual crime was not committed.

24 To prove a conspiracy, the government is not required
25 to show that two or more individuals sat around a table and

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1 entered into a solemn pact, orally or in writing, stating that
2 they have formed a conspiracy to violate the law and setting
3 forth the details of the plan and the means by which the
4 unlawful project is to be carried out or the part to be played
5 by each conspirator. Indeed, it would be extraordinary if
6 there were such a formal document or specific oral agreement.

7 Common sense tells us that when people in fact
8 undertake to enter into a criminal conspiracy, a great deal is
9 left to unexpressed understanding. From its very nature, a
10 conspiracy is almost invariably secret in its origin and
11 execution. Conspirators do not usually reduce their agreements
12 to writing or acknowledge them in front of a notary public, nor
13 do they normally publicly broadcast their plans. Thus, you may
14 infer the existence of a conspiracy from the circumstances of
15 the case and the conduct of the parties involved.

16 To show that a conspiracy existed, then, it is
17 sufficient if the evidence shows that two or more person in
18 some way or manner through any contrivance, explicitly or
19 implicitly, came to an understanding to violate the law and to
20 establish an unlawful plan. Express language or specific words
21 are not required to indicate assent or attachment to a
22 conspiracy. In determining whether there has been an unlawful
23 agreement, you may consider the acts and conduct of the alleged
24 conspirators which were done to carry out the apparent criminal
25 purpose. The old adage "actions speak louder than words" is

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1 applicable here. Often, the only evidence available with
2 respect to the existence of a conspiracy is that of
3 disconnected acts on the part of the alleged individual
4 conspirators. When taken together and considered as a whole,
5 however, these acts are capable of showing a conspiracy or
6 agreement as conclusively as would more direct proof.

7 In deciding whether the alleged conspiracy in fact
8 existed, you may consider all the evidence of the acts,
9 conduct, and declarations of the alleged conspirators and the
10 reasonable inferences to be drawn from such evidence. It is
11 sufficient to establish the existence of the conspiracy if,
12 after considering all of the relevant evidence, you find beyond
13 a reasonable doubt that the minds of at least two alleged
14 coconspirators met in an understanding way and that they
15 agreed, as I have explained, to work together in furtherance of
16 the lawful scheme alleged in the indictment.

17 In short, as far as the first element of the
18 conspiracy is concerned, the government must prove beyond a
19 reasonable doubt that at least two alleged coconspirators came
20 to a mutual understanding, either spoken or unspoken, to
21 violate the law in the manner charged in the indictment.

22 Now, the object of the conspiracy is the legal goal
23 the coconspirators agree or hope to achieve. The indictment
24 here charges two objects of the conspiracy in Count One,
25 namely, distribution of a control substance; two, possession

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1 with intent to distribute a controlled substance. I will
2 define the terms "distribution" and "possession" for you in a
3 moment.

4 Before I do that, I instruct you that in considering
5 the objects in Count One, the government does not have to prove
6 both the objects charged beyond a reasonable doubt. Rather, an
7 agreement to accomplish either one of the two objects of the
8 alleged conspiracy is sufficient. But if you find beyond a
9 reasonable doubt that one, but not both, of the objects were
10 proved, you must be unanimous as to which object you do find to
11 find the defendant you are considering guilty. That is, you
12 must all be in agreement with respect to at least one of the
13 alleged objects of the conspiracy charged in Count One. If the
14 government fails to prove at least one of the unlawful objects
15 or objectives of the conspiracy in Count One, then you must
16 find the defendant you are considering not guilty on that
17 conspiracy count. However, if you find that the conspirators
18 agreed to accomplish any of the objectives charged in the
19 conspiracy, the unlawful purpose element will be satisfied.

20 Mr. Van Manen and Mr. Charlton need not have known the
21 exact nature of the controlled substance -- that is, the type
22 of controlled substance involved in the conspiracy -- rather,
23 it is sufficient to convict if the government proves that (1)
24 the object of the conspiracy was to distribute a controlled
25 substance and (2) the conspiracy involved heroin and/or

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1 fentanyl. The government does not have to show that
2 Mr. Van Manen, Mr. Charlton, or any of their coconspirators
3 were aware that heroin and/or fentanyl were the object of the
4 conspiracy. Again, it is sufficient if they are merely aware
5 that the objective was to distribute or possess with intent to
6 distribute a controlled substance. Further, the government
7 need not prove the object of the conspiracy was the
8 distribution or the possession with intent to distribute both
9 heroin and fentanyl. However, you must be unanimous, that is,
10 you must all be in agreement, with respect to which drug or
11 drugs were involved in the conspiracy.

12 Further, as a matter of law, both heroin and fentanyl
13 are "controlled substances." The purity of the controlled
14 substance is not important to your determination of
15 Mr. Van Manen or Mr. Charlton's guilt or nonguilt. As I will
16 explain later, however, if you do find that the government has
17 proven the elements of Count One of the indictment beyond a
18 reasonable doubt, you will then be asked to make findings about
19 drug type and quantity.

20 Now let me define the terms "distribution,"
21 "possession," and "intent to distribute."

22 The word "distribution" means the actual,
23 constructive, or attempted transfer of a controlled substance.
24 To "distribute" simply means to deliver, to pass over, to hand
25 over something to another person, or to cause to be delivered,

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1 passed on, or handed over to another person. Distribution does
2 not require a sale, but it includes sales.

3 "Possession." The legal concept of "possession" may
4 differ from the everyday usage of the term, so let me explain
5 it in some detail. Actual possession is what most of us think
6 of as possession, that is, having physical custody or control
7 of an object, as I possess this pen. If you find that the
8 person you are considering had a controlled substance on his
9 person, you may find that he had possession of it. However, a
10 person need not have actual physical possession, that is,
11 physical custody of the object, in order to be in legal
12 possession of it. If an individual has the ability to exercise
13 substantial control over an object, even if he does not have
14 the object in his physical custody at a given moment, and that
15 person has the intent to exercise such control, then he is in
16 legal possession of that article. This is called "constructive
17 possession."

18 Control over an object may be demonstrated by the
19 existence of a working relationship between one person having
20 the power or ability to control the item and another person who
21 has actual physical custody. The person having control
22 possesses the item, that is, the controlled substance, because
23 he has an effective working relationship with the people who
24 have actual physical custody of the controlled substance and
25 because he can direct the movement or transfer or the

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1 disposition of the controlled substance. In addition, an
2 individual may have possession of an item that is not found on
3 his person because that individual has a relationship to the
4 location where the item is maintained. In this manner, for
5 example, a person may legally possess things that are scattered
6 throughout a number of stores or offices or installations
7 around the country.

8 More than one person can have control over the same
9 narcotics. The law recognizes that possession may be sole or
10 joint. If one person alone has actual or constructive
11 possession of a thing, possession is sole. If more than one
12 person has possession of it, as I have defined "possession" for
13 you, then possession is joint.

14 About "intent to distribute," "possession with intent
15 to distribute" simply means the possession of a controlled
16 substance with the intention or purpose to distribute it to
17 another person or persons. As I explained to you, to
18 "distribute" means simply to transfer to another. Basically
19 what you are determining is whether at least some of the drugs
20 in Mr. Van Manen or Mr. Charlton's possession were for their
21 personal use or for the purpose of distribution.

22 Often it is possible to determine whether someone has
23 an intent to distribute from the quantity of drugs that were
24 possessed, although the possession of a large quantity of drugs
25 does not necessarily mean that an individual intended to

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1 distribute them. On the other hand, an individual may have
2 intended to distribute a controlled substance even if he did
3 not possess a large amount of it. Remember, as I mentioned
4 earlier, the ultimate success of the conspiracy or the actual
5 commission of the crime that is the object of the conspiracy is
6 not required. The offense alleged here in Count One is the
7 conspiracy or agreement to distribute and possess with intent
8 to distribute a controlled substance.

9 If you conclude that the government has proved beyond
10 a reasonable doubt the existence of the conspiracy charged in
11 Count One, go on to the next question: Did Mr. Van Manen,
12 Mr. Charlton, or both, participate in the conspiracy with
13 knowledge of its unlawful purpose and in furtherance of its
14 unlawful objective?

15 The government must also prove beyond a reasonable
16 doubt that each defendant unlawfully, willfully, and knowingly
17 entered into the conspiracy, that is, that either
18 Mr. Van Manen, Mr. Charlton, or both, agreed to take part in
19 the conspiracy with knowledge of its unlawful purpose, and that
20 he or they agreed to take part in the conspiracy to promote and
21 cooperate in furtherance of its unlawful objective.

22 Now, as to this element, the terms "unlawfully,"
23 "willfully," and "knowingly" mean that you must be satisfied
24 that, in joining the conspiracy, assuming that you find that
25 either Mr. Van Manen, Mr. Charlton, or either, did join the

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1 conspiracy, the defendant you are considering knew what he was
2 doing, that is, he took the action in question deliberately and
3 voluntarily. The key question is whether either Mr. Van Manen,
4 Mr. Charlton, or both, joined the conspiracy and an awareness
5 of at least some of the basic aims and purposes of the unlawful
6 agreement. Let's talk about the terms "unlawfully,"
7 "intentionally," and "knowingly."

8 "Unlawfully" simply means contrary to law. The
9 defendant need not have known that he was breaking any
10 particular law or any particular rule, but he must have been
11 aware of the generally unlawful nature of his acts.

12 An act is done "knowingly" and "willfully" if it is
13 done deliberately and purposefully, that is, a defendant's acts
14 must have been the product of a conscientious objective, rather
15 than a product of mistake, accident, mere negligence, or some
16 other reason, innocent reason.

17 The ultimate facts of knowledge and criminal intent,
18 though subjective, may be established by circumstantial
19 evidence based upon a person's outward manifestations, words,
20 conduct, and acts and all the surrounding circumstances
21 disclosed by the evidence and the rational or logical
22 inferences that may be drawn therefrom.

23 The government contends that the evidence of certain
24 acts and conversations alleged to have taken place involving
25 the defendants or in their presence establishes their knowledge

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1 of the unlawful purpose of the conspiracy beyond a reasonable
2 doubt. By pleading not guilty, the defendants deny that they
3 committed the charged offense. It is for you to determine
4 whether the government has established to your satisfaction,
5 beyond a reasonable doubt, that such knowledge and intent on
6 the part of Mr. Van Manen, Mr. Charlton, or both, existed.

7 It is not necessary that Mr. Van Manen and
8 Mr. Charlton were fully informed as to all the details of the
9 conspiracy to justify an inference of knowledge on their part.
10 To have guilty knowledge, Mr. Van Manen and Mr. Charlton need
11 not have known the full extent of the conspiracy or all of its
12 activities or all of its participants. It is not even
13 necessary that Mr. Van Manen and Mr. Charlton knew every other
14 member of the conspiracy or indeed that they knew each other.
15 In fact, a defendant may know only one other member of the
16 conspiracy and still be a coconspirator. Nor is it necessary
17 that a defendant receive any monetary benefit from
18 participating in the conspiracy or have a financial stake in
19 the outcome, so long as he in fact participated in the
20 conspiracy in the manner I have explained.

21 A defendant also need not have joined the conspiracy
22 at the outset. He may have joined it at any time in its
23 progress, and he will still be held responsible for all that
24 was done before he joined and all that was done during the
25 conspiracy's existence while he was a member. Each member of a

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1 conspiracy may perform separate and distinct acts. Some
2 conspirators play a major roles while others play minor roles.
3 An equal role is not what the law requires. Even a single act
4 may be sufficient to draw a defendant within the scope of the
5 conspiracy.

6 I want to caution you, however, that a person's mere
7 association with a member of a conspiracy does not make that
8 person a member of the conspiracy, even when the association is
9 coupled with knowledge that a conspiracy exists. Mere presence
10 at the scene of a crime, even coupled with knowledge that a
11 crime is taking place, is not sufficient to support a
12 conviction. In other words, knowledge without agreement and
13 participation is not sufficient. What is necessary is that the
14 defendant you are considering participated in the conspiracy
15 with knowledge of its unlawful purpose, and with an intent to
16 aid in the accomplishment of its unlawful objective or
17 objectives.

18 Thus it is not required that the government show that
19 the coconspirators also knew that they were violating some
20 particular federal statute. But the government must show that
21 the coconspirators acted with the intent to help carry out some
22 essential step in the execution of the agreement to violate the
23 federal law that, in the case of Count One of the indictment,
24 alleges a violation of the narcotics laws, e.g., for example,
25 the unlawful distribution or the unlawful possession with the

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1 intent to distribute heroin and fentanyl.

2 A conspiracy, once formed, is presumed to continue
3 until either its objective is accomplished or there is some
4 affirmative act of termination by its members. So, too, once a
5 person is found to be a member of a conspiracy, he is presumed
6 to continue his membership in the venture until its
7 termination, unless it is shown by some affirmative proof that
8 he withdrew and disassociated himself from it.

9 Now, in instructing you this far with respect to
10 conspiracy, I have talked to you about the concept of
11 knowledge. I need to say one more thing about that concept,
12 and that deals with conscious avoidance.

13 In determining whether the defendant you are
14 considering acted with the necessary knowledge, you may
15 consider whether the defendant deliberately closed his eyes to
16 what otherwise would have been clear. As I have said,
17 knowledge cannot be established by showing that a defendant was
18 careless or negligent. On the other hand, one may not
19 willfully or intentionally remain ignorant of a fact that is
20 material and important to one's conduct in order to escape the
21 consequences of the criminal law.

22 I want to be clear that this concept only applies when
23 determining whether a defendant knew the objects or purposes of
24 the conspiracy; it does not apply when determining whether a
25 defendant knowingly participated in the conspiracy. It is

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1 logically impossible for a defendant to join a conspiracy
2 unless he knows that a conspiracy exists. Thus, for example,
3 if you find that either Mr. Van Manen, Mr. Charlton, or both,
4 were aware of a high probability that the conspiracy at issue
5 in Count One was to distribute narcotics, and either or both of
6 them consciously avoided confirming that fact, you may infer
7 that they implicitly had knowledge. If, however, Mr. Van Manen
8 or Mr. Charlton actually believed that the conspiracy was not
9 to distribute narcotics, or if they were merely negligent or
10 careless with regard to what knowledge they had, they lacked
11 the knowledge necessary to become a coconspirator.

12 A word or two about economic necessity. When
13 deliberating whether either Mr. Van Manen, Mr. Charlton, or
14 both, unlawfully, knowingly, and willfully entered into the
15 conspiracy charged in Count One of the indictment, I instruct
16 you that a defendant's economic status has no bearing on
17 whether the government proved that the defendant being
18 considered unlawfully, knowingly, and willfully entered into
19 the conspiracy. That is because economic necessity is not a
20 defense to the crime charged in Count One.

21 A word or two about multiple conspiracies. The
22 indictment charges that Mr. Van Manen and Mr. Charlton and the
23 other alleged coconspirators were all members of one single
24 conspiracy to possess with the intent to distribute heroin and
25 fentanyl. Whether a single conspiracy or multiple conspiracies

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1 exist is a question of fact that you must decide.

2 When two or more people join together to further one
3 common unlawful purpose -- one unlawful design or purpose, a
4 single conspiracy exists. By way of contrast, multiple
5 conspiracies exist when there are separate unlawful agreements
6 to achieve distinct purposes. Proof of several separate and
7 independent conspiracies is not proof of the single overall
8 conspiracy charged in the indictment, unless one of the
9 conspiracies proved happens to be the single conspiracy
10 described in the indictment.

11 You may find that there was a single conspiracy
12 despite the fact that there were changes in either personnel or
13 activities or both, so long as you find that some of the
14 coconspirators continued to act for the entire duration of the
15 conspiracy for the purpose charged in the indictment. The fact
16 that the members of a conspiracy are not always identical does
17 not necessarily imply that separate conspiracies exist.

18 On the other hand, if you find that the conspiracy
19 charged in the indictment did not exist, you cannot find any
20 defendant guilty of the single conspiracy charged in the
21 indictment.

22 (Continued on next page)

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1 THE COURT: This is so even if you find that some
2 conspiracy other than the one charged in the indictment
3 existed, even though the purpose of both conspiracies may have
4 been the same and even though there may have been some overlap
5 in membership. Similarly, if you find that a particular
6 defendant was a member of another conspiracy, and not the one
7 charged in the indictment, then you must acquit that defendant
8 of the conspiracy charge.

9 Therefore, what you must do is determine whether the
10 conspiracy charged in the indictment existed. If it did, you
11 then must determine the nature of the conspiracy and who were
12 its members.

13 You have heard about buyer-seller. A buyer-seller
14 relationship between a defendant and another person, standing
15 alone, cannot support a conviction for conspiracy. The fact
16 that a defendant may have bought heroin from another person or
17 sold heroin to another person is not sufficient without more to
18 establish that the defendant was a member of the charged
19 conspiracy. Instead, a conviction for conspiracy requires
20 proof of an agreement to commit a crime beyond that of the mere
21 sale.

22 In considering whether the evidence supports the
23 existence of a conspiracy or the existence of a buyer-seller
24 relationship, you may consider: (1) whether the sales were
25 made on credit or consignment; (2) the frequency of the sales;

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1 (3) the quantity of sales; (4) whether the parties advised each
2 other on the conduct of the other's business; (5) whether the
3 buyer purchased heroin from other sellers not involved in the
4 charged conspiracy; (6) the delve of trust demonstrated between
5 the buyer and seller, including the use of codes; (7) whether
6 the parties advised each other on the conduct of the other's
7 business; (8) whether the buyer assisted the seller by looking
8 for other customers; (9) whether the parties agreed to warn
9 each other of potential threats from competitors or law
10 enforcement; and (10) whether there were any limitations on the
11 buyer's ability to use or resell the heroin they purchased.

12 The presence or absence of any single factor is not
13 determinative, and you should use your own sense and judgment
14 in light of all of the evidence that has been presented to you.

15 Now, if, and only if, you conclude that the government
16 has met its burden of establishing the guilt of the defendant
17 you are considering beyond a reasonable doubt with respect to
18 the conspiracy charged in Count One of the indictment, you will
19 then be required to determine the quantity of heroin involved.
20 You do not need to make a determination with respect to
21 quantity of fentanyl.

22 As to each defendant you do not need to determine the
23 precise quantity of heroin involved in the offense.

24 Instead, as to Mr. Van Manen, with regard to heroin,
25 you must determine whether the government has proven beyond a

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Charge

1 reasonable doubt that Mr. Van Manen was either (1) personally
2 involved with the distribution of one kilogram or more or
3 between 100 grams to one kilogram or less than 100 grams of
4 mixtures or substances containing a detectable amount of
5 heroin; or (2) whether it was reasonably foreseeable to Mr. Van
6 Manen that the conspiracy involved one kilogram or more or
7 between 100 grams to one kilogram or less than 100 grams of
8 mixtures or substances containing a detectable amount of heroin
9 and that the distribution of such foreseeable quantity of
10 heroin was what he agreed to do with others.

11 As to Mr. Charlton, with regard to heroin, you must
12 determine whether the government has proven beyond a reasonable
13 doubt that Mr. Charlton was either personally involved with the
14 distribution of 100 grams or more of mixtures or substances
15 containing a detectable amount of heroin, or less than 100
16 grams of mixtures or substances containing a detectable amount
17 of heroin; or whether it was reasonably foreseeable to Mr.
18 Charlton that the conspiracy involved 100 grams or more of
19 mixtures or substances containing a detectable amount of heroin
20 or less than 100 grams of mixtures or substances containing a
21 detectable amount of heroin and that the distribution of such
22 foreseeable quantity of heroin was what he agreed to do with
23 others.

24 You will be provided with a verdict sheet or form that
25 will include a space for you to indicate your determination

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Charge

1 with respect to the quantity of heroin.

2 Your finding on the quantity must be unanimous in the
3 sense that all of you must agree that the conspiracy involved
4 at least the quantity you indicate on the verdict sheet. Thus,
5 for example, if all of you agree that the conspiracy involved
6 one kilogram or more of mixtures and substances containing a
7 detectable amount of heroin, you should indicate one kilogram
8 or more of heroin. If, for example, some jurors conclude that
9 the conspiracy involved one kilogram or more of heroin and the
10 rest of the jurors conclude that it involved between 100 grams
11 and one kilogram of heroin, you should indicate 100 grams to
12 one kilogram of heroin on the verdict sheet, because all of you
13 would be in agreement that the conspiracy involved at least 100
14 grams of heroin. If you conclude that the government has not
15 proved that the conspiracy involved between 100 grams to one
16 kilogram of heroin, then you may indicate less than 100 grams
17 of heroin on the verdict form.

18 In making your determination about the quantity of
19 heroin involved in the conspiracy charged in the indictment,
20 you should include whatever quantity of heroin was involved in
21 any act or acts in which the defendant you are considering
22 personally and directly participated. That is, if you find
23 that the defendant personally and directly participated in a
24 jointly undertaken drug transaction, he is responsible for the
25 full quantity of heroin involved in that transaction, whether

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Charge

1 or not he knew the specific quantity of drug involved in the
2 transaction.

3 In making your determination about the quantity of
4 heroin involved in the offense, you should also include any
5 heroin associated with any co-conspirators of the defendant you
6 are considering, as long as the quantity was either known to
7 the defendant or reasonably foreseeable to him, and within the
8 scope of the criminal activity that he jointly undertook.

9 Now, a word about death resulting in serious bodily
10 injury from a controlled substance.

11 Count One of the indictment also charges, with respect
12 to Mr. Van Manen only, that the use of drugs distributed
13 through the conspiracy resulted in the serious bodily injury of
14 Shaun Sullivan on or about October 5, 2017, and the death of
15 Michael Ogno on or about December 1, 2017. Thus, only if you
16 find Mr. Van Manen guilty of Count One, will you then be asked
17 to make two separate findings.

18 First, you will be asked to find whether the
19 government has proved beyond a reasonable doubt that Shaun
20 Sullivan's use of heroin and/or fentanyl distributed through
21 the conspiracy resulted in serious bodily injury to Mr.
22 Sullivan, and second, you will be asked to find whether Michael
23 Ogno's use of heroin and/or fentanyl distributed through the
24 conspiracy resulted in his death or serious bodily injury.
25 With respect to both the serious bodily injury and the death,

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1 you must also decide whether either Mr. Van Manen or a
2 co-conspirator for whose conduct Mr. Van Manen would be
3 accountable actually distributed drugs to Sullivan and Ogno.
4 Your findings must be unanimous.

5 As with the types of drugs involved, the government
6 need not prove that the heroin and/or fentanyl distributed
7 through the conspiracy resulted in both the serious bodily
8 injury of Shaun Sullivan and the death or serious bodily injury
9 of Michael Ogno. Instead, you should consider each question
10 separately -- that is, whether the heroin and/or fentanyl
11 distributed through the conspiracy resulted in the serious
12 bodily injury of Shaun Sullivan, and separately, whether the
13 heroin and/or fentanyl distributed through the conspiracy
14 resulted in the death or serious bodily injury of Michael Ogno.
15 On each of these questions, you may only enter that special
16 finding if you are unanimous, that is, if all of you are in
17 agreement with respect to whether either the serious bodily
18 injury or the death was caused by heroin and/or fentanyl
19 distributed through the conspiracy.

20 I instruct you that in order to find the serious
21 injury or death of a particular individual resulted from the
22 use of heroin and/or fentanyl distributed through the
23 conspiracy, you must find that the government has proven that
24 heroin and/or fentanyl distributed by Mr. Van Manen or a
25 co-conspirator was the cause of the alleged victim's serious

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Charge

1 bodily injury or death. In other words, the government must
2 prove that the alleged victim would not have suffered a serious
3 bodily injury or died on the date he did, but for the ingestion
4 of the heroin and/or fentanyl distributed by Mr. Van Manen or
5 one of his co-conspirators.

6 To be clear, the government is not required to show
7 that the heroin and/or fentanyl distributed through the
8 conspiracy was the only factor that brought about the alleged
9 victim's serious bodily injury or death. Indeed, it can be
10 sufficient if the heroin and/or fentanyl distributed through
11 the conspiracy caused the alleged victim's serious bodily
12 injury or death in combination with other causes, so long as
13 you find that the government has proven that the individual in
14 question would not have suffered a serious bodily injury or
15 died on the date he did, absent his ingestion of the heroin
16 and/or fentanyl distributed through the conspiracy. Put
17 another way, you must decide whether the incremental effect of
18 the heroin and/or fentanyl was the straw that broke the camel's
19 back in causing the serious bodily injury or death of the
20 victim or victims.

21 You must also consider whether the victim you are
22 considering in fact suffered a serious bodily injury or death.

23 With respect to the allegation that Shaun Sullivan
24 suffered a serious bodily injury, that means you must consider
25 whether the government proved beyond a reasonable doubt that

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Charge

1 the heroin and/or fentanyl distributed by the conspiracy placed
2 Shaun Sullivan at a substantial risk of death, caused him
3 protracted and obvious disfigurement, or caused protracted loss
4 or impairment of the function of a bodily member, organ, or
5 mental faculty.

6 With respect to the allegation that Michael Ogno died,
7 that means you must consider whether the government proved
8 beyond a reasonable doubt that Ogno in fact died on or about
9 the date alleged in the indictment.

10 Only if you find that the victim would not have
11 suffered a serious bodily injury or died, but for his ingestion
12 of heroin and/or fentanyl supplied as part of the conspiracy
13 charged in Count One, must you then consider whether Mr. Van
14 Manen is responsible for that serious bodily injury or death.

15 Mr. Van Manen is responsible for the victim's serious
16 bodily injury or death only if either one of two conditions has
17 been proven: First, if Mr. Van Manen personally and directly
18 participated in the transaction that resulted in the victim's
19 serious injury or death; or, second, the distribution of the
20 heroin and/or fentanyl that caused the victim's serious bodily
21 injury or death was either known to Mr. Van Manen or was
22 reasonably foreseeable to him, and was within the scope of the
23 criminal activity that he jointly undertook. If you find
24 either of those to be true, this requirement is met.

25 In addition to all of the elements that I have

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1 described to you, you must decide whether there is venue in
2 this judicial district -- that is, the Southern District of New
3 York. For the crime of conspiracy to distribute controlled
4 substances, the government must establish that some act in
5 furtherance of the conspiracy was committed in the Southern
6 District of New York.

7 This means that you must decide whether the unlawful
8 agreement, or any act committed to further or promote the
9 conspiracy, occurred within the Southern District of New York.
10 Such acts include the distribution of controlled substances or
11 the transportation of controlled substances to their final
12 point of sale. In this regard, the government need not prove
13 that the crime itself was committed in this district or that
14 the defendant you are considering himself was present here. It
15 does not matter whether the act was committed by a defendant or
16 an alleged co-conspirator.

17 The Southern District of New York includes Manhattan,
18 the Bronx, Westchester, Dutchess, Putnam, Orange, Sullivan, and
19 Rockland counties, the waterways surrounding those counties,
20 including the East River, the Hudson River, and Kill Van Kull,
21 and all of the bridges that traverse those waterways, including
22 the Verrazzano-Narrows Bridge, which traverses the narrows, the
23 body of water separating Staten Island and Brooklyn, the
24 Bayonne Bridge, which traverses the Kill Van Kull, the body of
25 water separating Staten Island and Bayonne, New Jersey, and the

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1 Goethals Bridge, which traverses the Arthur Kill straight, the
2 body of water separating Staten Island and New Jersey, and the
3 Outerbridge Crossing, which traverses the Arthur kill straight,
4 the body of water separating Staten Island and New Jersey.

5 I further instruct you that with respect to the
6 charges against Mr. Van Manen, that the use of heroin and/or
7 fentanyl distributed through the conspiracy resulted in the
8 serious bodily injury of Shaun Sullivan on or about October 5,
9 2017, and the death of Michael Ogno on or about December 1,
10 2017, the government need not show that the serious bodily
11 injury or death, or that the drugs those victims were allegedly
12 provided that caused the serious bodily injury or death,
13 occurred in the Southern District of New York. Rather, venue
14 as to those charges is satisfied if you find that any act in
15 furtherance of the conspiracy charged in Count One occurred in
16 the Southern District of New York.

17 I should note that on this issue -- and this issue
18 alone -- the government need not prove venue beyond a
19 reasonable doubt, but only by the lesser standard of a
20 preponderance of the evidence. Thus, the government has
21 satisfied its burden on this issue if you conclude that it is
22 more likely than not that venue exists. But I remind you that
23 the government must prove all other elements of the offenses
24 beyond a reasonable doubt.

25 That concludes my instructions on the substantive law.

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Charge

1 Now, my concluding instructions.

2 You are about to go into the jury room and begin your
3 deliberations. Your function now is to weigh the evidence in
4 this case and to determine whether the government has proved
5 beyond a reasonable doubt that Mr. Van Manen, Mr. Charlton, or
6 both, are guilty of the offenses charged in the indictment.
7 Remember, you must answer as to each defendant separately.

8 You must base your verdict solely on the evidence and
9 these instructions as to the law, and you are obliged under
10 your oath as jurors to follow the law as I have instructed you,
11 whether you agree or disagree with the particular law in
12 question.

13 The verdict must represent the considered judgment of
14 each juror. In order to return a verdict, it is necessary that
15 each juror agree to it. Your verdict must be unanimous. If
16 you are divided, do not report how the vote stands, and if you
17 have reached a verdict, do not report what it is until you are
18 asked in open court.

19 When you retire to the jury room, you must have a
20 foreperson. That person will preside over the deliberations
21 and speak for you here in open court. Other than those
22 functions, the foreperson will have no greater or lesser
23 authority than any other juror.

24 It is my custom to select Juror No. 1 in every case to
25 be the foreperson of the jury. Accordingly, I am now selecting

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Charge

1 Juror No. 1, Ms. Bader, to be your foreperson.

2 It is your duty as jurors to consult with one another
3 and to deliberate with a view towards reaching an agreement.
4 Each of you must decide the case for herself, but do so only
5 after an impartial discussion and consideration of all the
6 evidence in the case with your fellow jurors. In the course of
7 your deliberations, do not hesitate to re-examine your own
8 views and change an opinion if you become convinced it is
9 erroneous. But do not surrender your honest convictions as to
10 the weight or effect of evidence solely because of the opinions
11 of your fellow jurors.

12 Because it is essential that every juror consider all
13 the facts and arguments before reaching a decision, all of you
14 must be present in order to deliberate. If any juror takes a
15 break during the course of your deliberations, you have to stop
16 discussing the case until she returns. Similarly, if any juror
17 arrives late in the morning, you may not commence your
18 deliberations until all 12 of you are present.

19 For your deliberations, you will be provided with
20 copies of these instructions, as I told you, and I will give
21 you copies of the indictment. You will also be provided with
22 one verdict sheet on which you will record your verdict.

23 I am going to send the exhibits received in evidence
24 into the jury room. If you want any of the testimony read, you
25 may also request that. Please remember that it is not always

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Charge

1 easy to locate what you might want, so be as specific as you
2 possibly can in requesting testimony or portions of testimony.
3 If you want further explanation of the law as I have explained
4 it to you, you may also request that from the Court. If there
5 is any doubt or question about the meaning of any part of this
6 charge, you may ask for clarification or further explanation.

7 Your requests -- or any other communication you wish
8 to make with the Court -- should be made to me in writing,
9 signed by your foreperson, and given to one of the court
10 security officers. Bear in mind that you are never to reveal
11 to any person -- not even to me -- how you, the jury, stand
12 numerically or otherwise, on the questions before you, until
13 after you have reached a unanimous verdict.

14 Your decision has to be unanimous, but you are not
15 bound to surrender your honest beliefs concerning the effect or
16 weight of the evidence for the mere purpose of returning a
17 verdict or solely because of the opinion of other jurors.
18 Discuss and weigh your respective opinions dispassionately,
19 without regard for sympathy, prejudice or favor for either
20 party, and adopt that conclusion that in your good conscience
21 appears to be in accordance with the truth.

22 Some of you have taken notes during the trial. As I
23 told you at the beginning of the trial, this is permitted
24 because some people find that taking notes helps them focus on
25 the testimony. Your notes are for your private use only, as a

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Charge

1 way to help you recall the testimony as you begin your
2 deliberations. A juror's notes are entitled to no greater
3 weight than the recollections of a juror who does not take
4 notes.

5 Your function now is to weigh the evidence in this
6 case and to determine whether the government has or has not
7 established Mr. Van Manen, Mr. Charlton, or both defendants'
8 guilt beyond a reasonable doubt with respect to Count One of
9 the indictment. You must base your verdict solely on the
10 evidence and these instructions as to the law. You are obliged
11 by your oath as jurors to follow the law as I instruct you,
12 regardless of whether you agree or disagree with the particular
13 law in question. Remember at all times you are not partisans.
14 You are judges -- judges of the facts. Your sole interest is
15 to seek the truth from the evidence in this case.

16 Now, as to the alternate juror, Mr. Jackson, only 12
17 can deliberate. So I am going to excuse Mr. Jackson now. You
18 will notice I said "excuse" and not "dismiss." There may be
19 circumstances where you will have to be recalled such as one of
20 the 12 jurors unexpectedly becomes unavailable.

21 In addition to thanking you for your punctuality, your
22 faithful attendance, and the close attention you paid, I am
23 going to instruct you, Mr. Jackson, not to discuss the case
24 with anyone; not to read, listen to, or watch any news reports;
25 and not to do any research until this case is over.

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1 We have your contact information, Mr. Jackson, and we
2 will contact you should the need arise. If no need arises, we
3 will contact you when the jury of 12 concludes its
4 deliberations.

5 If you took notes, Mr. Jackson, please leave them
6 behind. Please do not take any notebook or the transcripts.

7 You are excused now.

8 (Alternate juror excused)

9 THE COURT: I will hear counsel at the sidebar.

10 (At the sidebar)

11 THE COURT: Any objections other than the ones you
12 already have made?

13 MR. QUIJANO: No, your Honor.

14 MS. O'NEILL: No, your Honor.

15 MR. FINKEL: No, your Honor.

16 THE COURT: Thank you.

17 MR. FINKEL: Would you allow the jury to deliberate
18 the full day on Friday if they would like?

19 THE COURT: I am going to tell them now, while we are
20 waiting for the marshal to come up so he can be sworn in, that
21 it's up to them to deliberate. I think we have been told by
22 David that some of the jurors have 4:30 appointments and want
23 to leave at 4:30 today. So I don't know about tomorrow.

24 MR. FINKEL: Very well.

25 THE COURT: I will tell them to let us know.

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(In open court)

THE COURT: Swear in the marshal.

(Marshal sworn)

THE COURT: Now, before you retire to begin your deliberations, your schedule for deliberations is strictly up to you. You can stay as long as you want. You can stay as short as you want. We have to wait for you to reach a conclusion. It might be helpful if at the end of the day, Madam Foreperson, you let us know what your schedule is going to be today, and tomorrow, if you have to go into tomorrow.

All right, marshal.

(Jury retires to deliberate; time noted: 10:25 a.m.)

THE COURT: Can we have the exhibits?

MR. QUIJANO: Yes, your Honor.

THE COURT: Did you get yours? You found them or you have duplicates?

MR. QUIJANO: They are duplicates.

MR. FINKEL: The government has our exhibits as well. We will confer with defense counsel to see if there are any issue with them.

So the Court is aware, the government has prepared a clean laptop that contains just the recordings that were admitted into evidence and certain cell files -- there are no other documents on it -- just to allow the jury to listen to whatever calls and review electronic evidence.

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1 THE COURT: You're not sending that into the jury
2 room, are you?

3 MR. FINKEL: We were planning to, if your Honor would
4 like us to.

5 THE COURT: Let's have them ask first. Don't send it
6 in.

7 MR. QUIJANO: Actually, two are originals, two are
8 duplicates, for my exhibits.

9 MS. O'NEILL: The Court has our exhibits, our
10 originals already, I believe.

11 THE COURT: You're wrong about that, Ms. O'Neill. I
12 don't have any exhibits.

13 MR. SANTIAGO: Your Honor, I gave them to David a day
14 or two ago.

15 THE COURT: Mr. Santiago, wait till David comes back.

16 MS. FENDER: We also have requested that both defense
17 counsel send us copies of their exhibits. We don't have Mr.
18 Van Manen's, but we do, I believe, have some version of Ms.
19 O'Neill and Mr. Santiago's. So worst-case scenario, we have
20 those electronically. We can go print copies downstairs, your
21 Honor, if we have just a few minutes.

22 THE COURT: I stand corrected, Mr. Santiago.

23 MS. O'NEILL: We are very relieved.

24 THE COURT: Mr. Santiago, I have C, D, and E.

25 MR. SANTIAGO: C, D, and E were entered into evidence.

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1 THE COURT: There is no A and B?

2 MR. SANTIAGO: No. They were just used for
3 identification.

4 THE COURT: So that takes care of Mr. Charlton, C, D,
5 and E.

6 MS. O'NEILL: Yes, your Honor.

7 THE COURT: When David comes back, you should leave
8 your cell phone numbers and we will call you. But I would hang
9 around for a while.

10 MR. FINKEL: Thank you, your Honor.

11 MS. O'NEILL: Thank you, your Honor.

12 (Recess pending verdict)

13 THE COURT: We have another note from the jury, and I
14 will give it to you.

15 "We would like a copy of Bryan Dunn, Jessica Fyfe,
16 Dimitri Devito, and Brittany Christie's testimony."

17 Mark this as Court Exhibit 3. I am going to give it
18 to the government and the defendants.

19 MS. FENDER: For the record, just to clarify, Court
20 Exhibit 1 and 2 are what?

21 Court Exhibit 2, I assume, is this note.

22 THE COURT: Yes.

23 MS. FENDER: What was Court Exhibit 1?

24 THE COURT: I don't know. We will have to wait until
25 David comes back.

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1 David, what is Court Exhibit 1?

2 THE DEPUTY CLERK: The one where they asked for the
3 jury charge.

4 THE COURT: Court Exhibit 1 was the note where they
5 requested four more copies of the jury charge because some
6 pages were missing. We didn't convene for that. We just gave
7 out the four additional charges.

8 MS. FENDER: Your Honor, just to make effective use of
9 time. So the government had taken the liberty of preparing
10 redacted versions of the transcripts in advance so that we
11 could move efficiently. We had provided those to defense
12 counsel, and I think they have had an opportunity to review
13 that. We will see if there are any issues. In general, how do
14 you like to provide transcripts back to the jury? We have
15 already redacted just one copy. I don't know what your Honor's
16 practice is.

17 THE COURT: My practice is not to give them the
18 transcript but to ask them what they want read back. I am open
19 to other alternatives.

20 MS. FENDER: We are happy to proceed however your
21 Honor wants to proceed. We have the prepared redacted
22 transcripts if you decide it's appropriate to send them back.

23 (Defendants present)

24 THE COURT: Court Exhibit 2. They need clarification
25 on page 47 of the jury charge. Everybody has copies of that.

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1 I will take suggestions from the government and from
2 the defendants. How do you suggest we respond?

3 MR. FINKEL: We have a proposed answer to that
4 question. We would ask that the Court instruct the jury the
5 following:

6 The instructions on pages 46 and 47 were different
7 ways to explain but-for causation. The issue for you, the
8 jury, is to determine whether the government proved beyond a
9 reasonable doubt that the victim would not have suffered a
10 serious bodily injury or death but for the fentanyl and/or the
11 heroin distributed by the conspiracy. However, the government
12 need not show that heroin and/or fentanyl was the only factor
13 that brought about the injury or death. For example, in this
14 trial, you may have heard evidence that there was Xanax,
15 fentanyl and heroin in Michael Ogno's body at the time of his
16 death. The question for you to determine is whether, but for
17 the fentanyl and/or heroin, if it were distributed by the
18 conspiracy, he would not have died but for the fentanyl and/or
19 heroin in his system.

20 THE COURT: Mr. Quijano.

21 MR. QUIJANO: May I have one moment, please, your
22 Honor.

23 MS. SIDERIS: Your Honor, the proposed language by the
24 government we would object to. If a clarification is given, we
25 would certainly object to everything the government said after

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1 "however," and just clarify that the instructions on page 46
2 and 47 are ways to explain but-for causation. The issue for
3 you, the jury, is to determine whether the government proved
4 beyond a reasonable doubt that the victim would not have
5 suffered a serious bodily injury or death but for the fentanyl
6 and/or the heroin distributed by the conspiracy, period.

7 MR. FINKEL: The government doesn't think that
8 adequately answers the jury's question. Certainly here, with
9 respect to Mr. Ogno, there were multiple substances in his
10 blood, and clearly the jury is trying to determine, it would
11 seem, how to assemble all this evidence and what the law
12 directs them to do. And the law on that issue is clear.
13 Fentanyl and heroin does not need to be the only thing that
14 contributed to the death of Mr. Ogno. The question that they
15 have to consider is whether the fentanyl and heroin -- but for
16 the fentanyl and heroin, whether he would have died.

17 So we think it's certainly appropriate -- it's
18 consistent with your Honor's instructions that were delivered
19 this morning, consistent with the Supreme Court case that the
20 government cited in its letter -- to explain that heroin and
21 fentanyl need not be the only thing that caused the death. And
22 we think the example that I articulated before is appropriate
23 here so the jury understands the context in which this
24 instruction is given.

25 MS. SIDERIS: We believe it is sufficient for the

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1 Court to say that the instructions were ways to explain, and
2 then state the law. Everything after "however" is not the law
3 and --

4 THE COURT: Tell me what is after "however."

5 MR. FINKEL: I believe it is the law. However, the
6 government need not show that heroin and/or fentanyl was the
7 only factor that brought about the injury or death. That is
8 adopted from your Honor's instructions this morning.

9 THE COURT: Give me your language again.

10 MR. FINKEL: The instructions on page 46 and 47 were
11 different ways to explain but-for causation.

12 THE COURT: Different ways to explain but-for
13 causation. Yes.

14 MR. FINKEL: The issue for you to determine, as
15 explained on pages 46 and 47, is whether the government proved
16 beyond a reasonable doubt that the victim would not have
17 suffered a serious bodily injury or death but for the
18 fentanyl --

19 THE COURT: Would not have suffered a serious bodily
20 injury or death.

21 MR. FINKEL: But for the fentanyl or heroin
22 distributed by the conspiracy.

23 THE COURT: Ms. Sideris, that language that Mr. Finkel
24 just gave is acceptable to you?

25 MS. SIDERIS: Yes, your Honor, right now.

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1 THE COURT: Up to the "however" clause.

2 MS. SIDERIS: I believe that's all that is necessary
3 to provide clarification up to this point.

4 THE COURT: And give me the "however" clause again,
5 Mr. Finkel.

6 MR. FINKEL: Certainly. It's adopted from the
7 instructions that you gave this morning on page 47. And it
8 says, However, the government need not show that heroin and/or
9 fentanyl was the only factor that brought about the injury or
10 death.

11 That's, as I mentioned, adopted from the top of page
12 47.

13 THE COURT: Give it to me again.

14 MR. FINKEL: However, the government need not show
15 that heroin and/or fentanyl was the only factor that brought
16 about the injury or death.

17 THE COURT: OK.

18 MR. FINKEL: Then we would also, as I read before,
19 offer: For example, in this trial, you may have heard evidence
20 that there was Xanax, fentanyl and heroin in Michael Ogno's
21 body at the time of his death.

22 THE COURT: I am not going to do that. I haven't been
23 commenting on the evidence all the way through.

24 MR. FINKEL: Understood.

25 MS. SIDERIS: Your Honor, my objection is the same. I

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1 believe that the instructions on page 46 and 47, the first
2 sentence of the proposed -- the first clause of the first
3 sentence of the proposed language covers the instructions on
4 page 46 and 47, including the sentence starting with "however."

5 MR. FINKEL: Your Honor, respectfully, I think that's
6 an incomplete recitation of the law that the jury is required
7 to consider. And just reading from your instructions this
8 morning on page 47, this is from your Honor's instructions:
9 "To be clear, the government is not required to show that the
10 heroin and/or fentanyl distributed through the conspiracy was
11 the only factor that brought about the alleged victim's serious
12 bodily injury or death. Indeed, it can be sufficient if heroin
13 and/or fentanyl distributed through the conspiracy caused the
14 alleged victim serious bodily injury or death in combination
15 with other causes." And it goes on.

16 THE COURT: I already told them that. Why should I
17 tell them again?

18 MR. FINKEL: I think the reason why is because they
19 seem to be confused about it. And if we were to tell them just
20 a piece of it, respectfully, your Honor, I don't think it
21 establishes --

22 THE COURT: "In combination with" is different from
23 "the straw that broke the camel's back." I think the straw
24 that broke the camel's back is an elaboration of combination.
25 So we are just clarifying that.

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1 MR. FINKEL: I think to clarify that, it's important
2 that they understand what is the law as you read to them, which
3 is that heroin and fentanyl need not be the only things that
4 caused the death or injury. I think that's particularly
5 important in this case, and given the language in the jury's
6 note, that seems to be what the tension is. And to provide
7 them the full explanation I think is necessary.

8 MS. SIDERIS: Again, your Honor --

9 THE COURT: I understand.

10 Now, what about the second note, the transcripts of
11 Bryan Dunn, Jessica Fyfe, Mr. Devito, and Ms. Christie?

12 MR. FINKEL: The government is prepared to proceed
13 however the Court would like. We have the transcripts printed.
14 We can provide them to the jury. If the Court would prefer a
15 readback, that's fine with the government.

16 THE COURT: Mr. Quijano, Ms. Sideris, Ms. O'Neill.

17 MS. SIDERIS: I think I speak for the entire defense
18 that they should be provided with the transcripts, if that's
19 what they request.

20 THE COURT: The government object?

21 MR. FINKEL: No.

22 THE COURT: All right.

23 The instructions at 46 and 47 were different ways to
24 explain but-for causation. Is that correct so far?

25 MS. SIDERIS: Yes, your Honor.

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1 MR. FINKEL: Yes your Honor.

2 THE COURT: The issue for you to decide is whether,
3 whether what?

4 MR. FINKEL: Whether the government has proven beyond
5 a reasonable doubt --

6 THE COURT: Whether the government has proved beyond a
7 reasonable doubt that.

8 MR. FINKEL: -- that the alleged victim would not have
9 suffered --

10 THE COURT: Would not have suffered serious bodily
11 injury or death but for?

12 MR. FINKEL: But for the ingestion of heroin and/or
13 fentanyl distributed through the conspiracy.

14 THE COURT: However what?

15 MR. FINKEL: However, the government need not show
16 that the heroin and/or fentanyl distributed through the
17 conspiracy was the only factor that brought about the victim's
18 serious bodily injury or death.

19 THE COURT: Heroin or fentanyl is what?

20 MR. FINKEL: The heroin or fentanyl distributed
21 through the conspiracy was not the only factor that -- let me
22 repeat it again.

23 However, the government need not show that the heroin
24 and/or fentanyl distributed through the conspiracy was the only
25 factor that brought about the victim's serious bodily injury or

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1 death.

2 THE COURT: All right.

3 MR. FINKEL: Thank you.

4 THE COURT: Call the jury out.

5 MS. FENDER: If you are inclined to send the
6 transcripts back, just so we can prepare those, how many copies
7 would you like for us to prepare? We will make them as quickly
8 as possible.

9 THE COURT: Make one copy available.

10 MS. FENDER: One copy?

11 THE COURT: Yes.

12 MS. FENDER: Thank you, your Honor.

13 (Jury present; time noted: 1:20 p.m.)

14 THE COURT: Please be seated.

15 We have two notes from you.

16 The second note reads: We would like a copy of Bryan
17 Dunn, Jessica Fyfe, Dimitri Devito, and Brittany Christie's
18 testimony.

19 We are going to make a copy of the transcript and make
20 the testimony of Mr. Dunn, Ms. Fyfe, Mr. Devito, and Ms.
21 Christie available to you.

22 The first note that we got is: We need clarification
23 on page 47 of the jury charge, first full paragraph: "Indeed,
24 it can be sufficient... caused the alleged victim's bodily
25 injury or death in combination with other causes"... versus

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1 "you must decide whether the incremental effect was the straw
2 that broke the camel's back in causing ..." and so forth.

3 Then the question is: In combination with is
4 different from the straw that broke the camel's back.

5 The instructions on page 46 and 47 were different ways
6 to explain but-for causation. The issue for you to determine,
7 as explained on pages 46 and 47, was whether the government has
8 proved beyond a reasonable doubt that the alleged victim would
9 not have suffered a serious bodily injury or death but for the
10 ingestion of heroin and/or fentanyl distributed through the
11 conspiracy. However, the government need not show that the
12 heroin and/or fentanyl distributed through the conspiracy was
13 the sole factor that brought about the victim's serious bodily
14 injury or death.

15 That's the answer to your question and the transcripts
16 will be sent in through the marshal.

17 You can resume your deliberations. Thank you.

18 (Jury resumes deliberations; time noted: 1:24 p.m.)

19 (Recess pending verdict)

20 THE COURT: We have got another note from the jury,
21 which I have copied and given to counsel for the defendants and
22 for the defendant.

23 "We have decided unanimously on all of the counts with
24 the exception of Michael Ogno's death. We are very divided and
25 cannot reach consensus. How should we proceed?"

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1 First of all, I instructed this morning that they
2 should never reveal to any person -- not even to me -- how you,
3 the jury, stand, numerically or otherwise, on the questions
4 before you, until after you have reached a unanimous verdict.

5 They seem to have ignored that. What should we do
6 about that? And what should we do about the request how should
7 we proceed?

8 MR. FINKEL: Your Honor, the government's view is the
9 jury has not even deliberated for a full day. We would ask the
10 Court just to provide a gentle reminder to the jury that they
11 have all the time they need to consider the charges, to
12 consider the evidence in this case, and certainly have more
13 time than just the time that they have been deliberating. We
14 think that's sufficient.

15 With respect to the fact that they have revealed their
16 vote on other charges, we would just ask that you tell them not
17 to do that again. I think that will address the issue.

18 MR. QUIJANO: We'd ask the Court to declare a
19 mistrial, and, in the alternative, to take a verdict and
20 declare a mistrial -- one moment, your Honor.

21 Your Honor, we would request that the Court grant a
22 mistrial as to the entire case since they did not follow the
23 instructions about revealing this information. And, in the
24 alternative, to take the verdict and declare a mistrial as to
25 the Ogeno enhancement.

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1 THE COURT: Ms. O'Neill.

2 MS. O'NEILL: We would also request a mistrial due to
3 the jury's failure to follow the Court's instructions. They
4 seem to be deadlocked at least on one count and should have
5 waited until they had a unanimous decision as to all the
6 counts.

7 THE COURT: Mr. Finkel.

8 MR. FINKEL: Of course the government does not believe
9 there are any grounds, and I don't believe defense counsel has
10 cited any legal grounds why there would need to be a mistrial
11 over this note. The jury is merely expressing that they are
12 considering one of the elements that they need to consider, and
13 that's what juries do. So I don't think there is any basis at
14 all to declare a mistrial.

15 With respect to how we should proceed from here, your
16 Honor, again, they haven't been deliberating very long. There
17 was a week and a half of testimony. Some of the issues are
18 quite complicated involving expert testimony. They should take
19 the time they need to work through the issues.

20 THE COURT: Should I read them the language that
21 appears on page 52 and 53? "To consult with one another and to
22 deliberate with a view towards reaching an agreement," the
23 first full paragraph, their duty to deliberate, on page 52.
24 And page 53, "Your decisions must be unanimous, but you are not
25 bound to surrender your honest beliefs concerning the effect or

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1 weight..." Just direct them to those portions of the jury
2 charge?

3 MR. FINKEL: The government feels that is appropriate.
4 And the government also believes that it's appropriate for you
5 to tell the jury that they haven't been deliberating all that
6 long and they should take the time they need. Thank you.

7 THE COURT: Mr. Quijano.

8 MR. QUIJANO: Your Honor, we believe the Court should
9 proceed in that manner, as far as page 52, reviewing that with
10 them.

11 THE COURT: Your application for a mistrial is denied.
12 Please call in the jury.

13 (Jury present; time noted: 3:46 p.m.)

14 THE COURT: We have your note.

15 I want to direct your attention to page 53 of the jury
16 charge where I instructed you: Bear in mind that you are never
17 to reveal to any person -- not even to me -- how you, the jury,
18 stand, numerically or otherwise, on the questions before you,
19 until after you have reached a unanimous verdict. So I ask you
20 to comply with that.

21 You have been deliberating since 10:30 this morning
22 till 3:30 in the afternoon. That's five hours. That may seem
23 like a long time, but it actually is a very brief time
24 considering the length and complexity of the trial. So what I
25 would ask you to do is read page 52 of the instructions and

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1 page 53 of the instructions, and ask you to deliberate further
2 on this matter.

3 Thank you very much.

4 (Jury resumes deliberations; time noted: 3:47 p.m.)

5 THE COURT: I am going to mark this most recent note
6 from the jury as Court Exhibit 4.

7 Everybody has copies?

8 MR. FINKEL: Yes, your Honor.

9 THE COURT: Thank you.

10 (Recess pending verdict)

11 (Jury present; time noted: 6:00 p.m.)

12 THE COURT: You have reached a verdict.

13 FOREPERSON: Yes.

14 THE DEPUTY CLERK: Count One: Narcotics conspiracy.

15 How do you find the defendant, Paul Van Manen, with
16 respect to Count One?

17 FOREPERSON: Guilty.

18 THE DEPUTY CLERK: If you find that the narcotics
19 conspiracy charged in Count One has been proved beyond a
20 reasonable doubt as to defendant Paul Van Manen, please
21 indicate: (1) the quantity of the controlled substance (or
22 substances) Paul Van Manen conspired to distribute; (2) whether
23 the controlled substance (or substances) Paul Van Manen
24 conspired to distribute resulted in the death of Michael Ogno;
25 and (3) whether the controlled substance (or substances) Paul

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1 Van Manen conspired to distribute resulted in the serious
2 bodily injury of Shaun Sullivan, as set forth below:

3 If you found that Paul Van Manen conspired to
4 distribute heroin, please indicate the quantity of heroin
5 involved in the conspiracy by checking one of the following:

6 Heroin quantity.

7 FOREPERSON: 1 kilogram or more.

8 THE DEPUTY CLERK: If you find that the conspiracy
9 involved fentanyl, please indicate here:

10 Fentanyl.

11 FOREPERSON: Yes.

12 THE DEPUTY CLERK: Death of Michael Ogno.

13 FOREPERSON: Yes.

14 THE DEPUTY CLERK: Serious bodily injury of Shaun
15 Sullivan.

16 FOREPERSON: Yes.

17 THE DEPUTY CLERK: How do you find the defendant,
18 Kenneth Charlton, with respect to Count One?

19 FOREPERSON: Not guilty.

20 THE COURT: Ladies, thank you very much for your very
21 conscientious hard work and service. I never comment on a jury
22 verdict. Your verdict is strictly your own. And I am honored
23 that you did such hard, conscientious work. I appreciate it
24 very much. You have the thanks of the whole country. Thank
25 you very much.

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1 You are discharged now.

2 Some of the lawyers may want to speak to you. It's up
3 to you whether you want to speak to the lawyers.

4 (Jury excused)

5 THE COURT: Please be seated.

6 We will prepare an order for Mr. Charlton in releasing
7 him from custody. We will do that right now and deliver it to
8 the marshal.

9 MS. O'NEILL: Your Honor, could you repeat what you
10 just said? I don't think the marshals heard you.

11 THE COURT: Do you want time for motions, Mr. Quijano?

12 MR. QUIJANO: Yes, your Honor. Could we have about
13 three weeks, please?

14 THE COURT: How many weeks?

15 MR. QUIJANO: Three.

16 THE COURT: Sure.

17 June 10.

18 MR. QUIJANO: Actually, can we go to the following
19 week?

20 THE COURT: June 17. That's four weeks.

21 MR. QUIJANO: Thank you.

22 THE COURT: I am going to sign an order dated May 16
23 directing that defendant, Kenneth Charlton, be released
24 immediately.

25 Anything else?

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1 Mr. Finkel.

2 MR. FINKEL: Not from the government, your Honor.

3 THE COURT: Mr. Quijano.

4 MR. QUIJANO: I didn't hear the question.

5 THE COURT: Do you have anything else?

6 MR. QUIJANO: No, your Honor.

7 THE COURT: Thank you very much.

8 (Adjourned)